No. 82-1071

IN THE

Supreme Court of the United States

October Term, 1983

ALUMINUM COMPANY OF AMERICA, et al.,
Petitioners,

v.

CENTRAL LINCOLN PEOPLES' UTILITY DISTRICT, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE INTERNATIONAL PAPER CO. AND LONGVIEW FIBRE CO. IN SUPPORT OF AFFIRMANCE

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BRIEF OF AMICI CURIAE INTERNATIONAL PAPER CO. AND LONGVIEW FIBRE CO.

Amici curiae, International Paper Company and Longview Fibre Company, submit this brief in support of the position of Respondents Central Lincoln Peoples' Utility District, et al. and of the decision of the Ninth Circuit Court of Appeals in *Central Lincoln Peoples' Utility District v. Johnson*, 686 F.2d 708 (9th Cir. 1982).

INTEREST OF AMICI

This case involves a dispute over the priority for allocation of nonfirm or secondary energy between a limited number of industries directly serviced by the Bonneville Power Administration (the direct service industries, or DSIs, most

of which are aluminum companies)[1] and preference customers of BPA (consisting of "public bodies" and cooperatives)[2] under the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §§ 839-839h (Supp. 1981) (the Regional Act). The court of appeals held that the preference customers' priority access to energy generated by the Bonneville Power Administration (hereinafter referred to as BPA) included a priority over the DSIs to this nonfirm energy.

BPA's preference customers utilize BPA nonfirm energy in several ways for the benefit of their industrial and other customers. For example, preference customers of BPA with their own generating facilities use nonfirm energy as a backup for energy which they generate from their own facilities when those facilities experience emergencies, undergo repair or are otherwise not able to supply energy to their customers. These preference customers also can and do contract with BPA for purchase of interruptible nonfirm energy for resale to their industrial customers to supply a portion of those customers' nonfirm energy needs.

International Paper Company and Longview Fibre Co., amici curiae in this case, are two of the numerous substantial Pacific Northwest industrial purchasers of electricity from BPA's preference customers. Both companies are energy

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1. As of 1980, there were fifteen direct service industry customers for BPA power. Of these, the primary producers of aluminum metal accounted for approximately 90% of the total BPA direct service industrial load. BPA, *Final Environmental Impact Statement, the Role of the Bonneville Power Administration in the Pacific Northwest Power Supply System* (DOE/EIS-0066) (Dec. 1980) at IV-80, in Joint App. at 30.

2. The term "preference customers" as used in this controversy refers to public bodies and cooperatives entitled to preference and priority to electrical energy generated at the Bonneville Project pursuant to Section 4 of the Bonneville Project Act, 16 U.S.C. § 832c (1976). The term "public bodies" is further defined in that Act to include "States, public power districts, counties and municipalities, including agencies or subdivisions of any thereof." Bonneville Project Act § 3, 16 U.S.C. § 832b (1976). Public utility districts in Washington and Peoples' utility districts in Oregon (PUDs) are included within this term. House Interior Report, H.R. Rep. No. 967 (II), 96th Cong., 2d Sess. 27, *1960 U.S. Code Cong. & Ad. News* 6,024-25, in Pet. App. at E-69.

intensive; both have experienced soaring electrical bills over the past few years, and their electrical costs have comprised an increasing percentage of their manufacturing costs. In addition, Longview Fibre Co. purchases nonfirm energy from the Cowlitz County Public Utility District which Cowlitz receives from BPA for Longview under an arrangement which will be impaired if the Ninth Circuit decision is overturned. The economic health of these companies' operations in the Pacific Northwest is directly affected by the outcome of this lawsuit.

Longview Fibre produces pulp and paper at its Longview, Washington, plant served by the Cowlitz County PUD. Longview operates seven days per week, 24 hours per day. It has 15 plants in other locations in the United States which depend on the Longview mill for raw material for manufacturing boxes and bags. It employs about 3,000 workers nationwide, nearly 2,000 of them at its Longview plant. In addition, 350 to 400 workers employed by other entities depend directly upon Longview Fibre for jobs transporting raw materials to its plant, and the company has indirectly created numerous other jobs in the Pacific Northwest for its suppliers and for the transportation of finished product to its markets.[3]

Longview Fibre purchases all of its electricity from the Cowlitz County PUD and uses most of it for pumps, pulp refining, paper machine drives, fans and conveying equipment. Through 1982, it purchased only "firm load" energy from Cowlitz County PUD, for which it was charged the firm load cost of energy from BPA to the PUD plus applicable surcharges and distribution costs. In the four years from 1979 to 1982, its electrical usage dropped from 870,000 megawatt hours to 660,000 megawatt hours, but its electrical costs increased from $3,335,000.00 to $10,250,000.00. This more than three-fold increase in electrical costs resulted from

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3. Bonneville Power Administration 1983 Wholesale Power and Transmission Rate Adjustment Hearings, May 23, 1983 (identified by BPA at those hearings as Exhibit WP83-E-PA-3), appended as Appendix A to this brief (Testimony of Richard Wollenberg, President and Chief Executive Officer of Longview Fibre Company).

a quadrupling of the cost per kilowatt hour of BPA electricity which Cowlitz passed on to Longview.[4]

Recently, BPA, because of an abundance of electrical energy, entered into a contract for sale of interruptible nonfirm energy to Cowlitz County PUD at the lower nonfirm energy rate for resale to Longview Fibre for use in steam generation. The energy resource for this steam generation was previously wood waste. BPA proposed in a Notice of Proposed Policy appearing in 48 Fed. Reg. 33,518-25 on July 22, 1983 that this and similar c[illegible]racts for nonfirm energy to be sold to BPA's preference customers for resale to their industrial customers be extended through June 30, 1987.

Access to this lower cost nonfirm energy is extremely important to Longview Fibre, and it will be directly affected by the outcome of this lawsuit. BPA clearly announced in its Notice of Proposed Policy that if demand for nonfirm energy exceeds supply, it will allocate the available nonfirm energy strictly "in accordance with Pub. L. 88-552 [16 U.S.C. §§ 837-837h (1976), Pacific Northwest Consumer Power Preference Act] and the Central Lincoln I decision [the case on review here] until such time as that case is finally adjudicated by the U.S. Supreme Court, and on a prorata basis within a customer class." 48 Fed. Reg. at 33,522. Accordingly, BPA will no longer honor the clause granting its preference customers priority over DSIs for nonfirm energy if the Ninth Circuit decision in this case is overturned. Longview Fibre thus has a direct economic interest at stake in this lawsuit.

International Paper Company operates a paper mill and a wood products mill in Gardiner, Oregon, served by respondent Central Lincoln Peoples' Utility District. The paper mill has employed an average of approximately 360 workers over the period 1979 through 1982 and used an average of about 175,000 megawatt hours per year of electricity during this period, all of it firm energy supplied by the Central Lincoln PUD. It has watched its electrical

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4. *Id.*

costs increase from 2.19% of total manufacturing costs to 4.33% during that time. Its wood products mill has employed an average of 285 workers over the same period and seen its electricity use decline from 24,000 kilowatt hours in 1979 to approximately 11,000 kilowatt hours in 1981 and 1982; yet its annual electrical costs have climbed from $161,000.00 in 1979 to $258,000.00 in 1982. These costs now account for a full 8% of its total manufacturing costs. A major industrial customer of Central Lincoln PUD, International Paper has a stake in assuring that Central Lincoln and other preference customers maintain their statutory priority access both to firm and to nonfirm energy. Central Lincoln and International Paper have been evaluating the feasibility of constructing a co-generation project at International Paper's plant. Availability of nonfirm energy would be an important component for such a co-generation project as backup energy for breakdowns and scheduled maintenance. Nonfirm energy would not be used for displacement because the co-generation project would always operate to produce process steam for International Paper's operations.

There are approximately 116 preference customers within the region served by the BPA.[5] Many of these preference customers supply energy to industrial customers in their territory. These relationships developed through the long history of public power in the Northwest under the Bonneville Project Act of 1937 [16 U.S.C. §§ 832-8321 (1976)], and these industrial customers have invested substantial sums in their enterprises in the expectation that their energy needs could be met by the PUDs and other public bodies in the region through priority access to lower cost BPA energy. The viability of these industrial customers and the livelihood of their employees depend upon the continued availability of reasonably priced electricity furnished to these preference customers.

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5. The 116 preference customers served by BPA include 36 municipal utilities, 54 rural electric cooperatives and 26 PUDs (Public Utility Districts in Washington and Peoples' Utility Districts in Oregon). House Interior Report, *supra* note 2 at 27, *1980 U.S. Code Cong. & Ad. News* at 6,025, in Pet. App. at E-69.

SUMMARY OF ARGUMENT

Existing law prior to enactment of the Regional Act gave preference and priority to public bodies and cooperatives for electrical energy generated by BPA. BPA faithfully applied this preference both to firm and nonfirm energy. The Regional Act explicitly preserved the pre-existing preference and priority. Congress thus reaffirmed both the preference and priority and its application. The legislative history of the Regional Act also supports Congress' intention to preserve the pre-existing preference and priority as it then existed.

In disregard of this statutory mandate, BPA, abetted by petitioners, seeks radically to alter application of the preference as it applies to nonfirm energy. Their position both lacks foundation in law and would create curious anomalies with preference provisions in other statutes. Moreover, as a policy matter, it is unreasonable to grant priority for nonfirm energy to the DSIs. They are the one group of users which can best withstand an intermittent interruption in power service. If their enormous demand for nonfirm power nevertheless were placed ahead of the nonfirm needs of BPA's preference customers, in time of shortage, the huge DSI demands would be met, while relatively modest nonfirm energy needs of the preference customers would very likely not be met at all.

The Ninth Circuit Court of Appeals' decision was both appropriate and proper. It should be affirmed.

ARGUMENTS AND AUTHORITIES

The Ninth Circuit Court of Appeals Correctly Decided This Controversy

The analysis of this case must start with recognition of the status of the preference granted to public bodies and cooperatives as it existed before enactment of the Regional Act. There is no dispute that then-existing law gave explicit "preference and priority to public bodies and cooperatives" when BPA disposed of "electrical energy generated at the project." Bonneville Power Project Act § 4(a), 16 U.S.C. § 832c(a)

(1976). This explicit statutory preference applied both to firm and to nonfirm energy. Moreoever, the BPA, consistent with this statutory requirement, faithfully applied this preference in allocating both firm and nonfirm energy. The Ninth Circuit noted that BPA interpreted that preference clause to apply both to firm energy and to nonfirm energy and described BPA's allocation scheme as follows:

> It is undisputed in this case that BPA previously interpreted the preference provision to apply to nonfirm power as well as firm power. Thus, prior to offering the contracts now at issue, BPA allocated nonfirm power according to the preference after it had first allocated firm power according to the preference.

Central Lincoln People's Utility District, 686 F.2d at 711.

BPA, in its own Environmental Impact Statement published in December, 1980, described its own pre-existing policy giving the public bodies and cooperatives priority over DSIs for nonfirm or secondary energy as follows:

> The current secondary sales policy calls for the following priorities in the allocation of any secondary energy: (1) All firm energy loads will be served if any are not being met. This includes the bottom three quartiles of the direct-service industrial (DSI) load; (2) new reservoirs will be filled or depleted reservoirs restored; (3) *public agencies' secondary power demands will be met, allowing them to refill their own reservoirs or displace thermal generation currently being used to serve their own loads; (4) when not all secondary demands can be met, the remaining energy is split approximately equally between private utilities and the direct service industries of the region*; (5) after the top quartile of the DSI loads has been met, private utilities in the region can then purchase secondary energy to displace any of their remaining thermal generation which they have declared necessary for meeting firm loads under the Pacific Northwest Coordination Agreement; and (6) after all applicable regional loads have been met, and water cannot be considered for later use in the region, surplus power is made available for sale to the Pacific Southwest over the California Intertie.

BPA, *Final Environmental Impact Statement on the Role of the Bonneville Power Administration in Pacific Northwest Power System, Thermal Power Program* (DPE/EIS-0066 (Dec. 1980) at IV-71 in Joint App. at 29 (emphasis supplied). This policy is of long duration. *Central Lincoln People's Utility District*, 686 F2d at 711.

When the Regional Act was adopted, Congress explicitly preserved the pre-existing preference and priority of these same public bodies and cooperatives. Not once, but twice, did it make this point.

First, it stated in Section 5(a) [16 U.S.C. § 839c(a) (Supp. 1981]:

> All power sales under this chapter shall be subject at all times to the preference and priority provisions of the Bonneville Project Act of 1937 and, in particular, Sections 4 and 5 thereof. Such sales shall be at rates established pursuant to Section 839e of this Title.

Sections 4 and 5 of the Bonneville Project Act clearly and explicitly set out the scope of the preference given to these public bodies and cooperatives.[6]

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6. Sections 4 and 5 of the Bonneville Project Act [16 U.S.C. § 832c and d (1976)]read in pertinent part as follows:

> §832c. *Distribution of electricity; preference to public bodies and cooperatives*
>
> (a) *General Provisions*
>
> In order to insure that the facilities for the generation of electric energy at the Bonneville project shall be operated for the benefit of the general public, and particularly of domestic and rural consumers, the administrator shall at all times, in disposing of electric energy generated at said project, give preference and priority to public bodies and cooperatives.
>
> (b) *Prior to January 1, 1942; subsequent thereto*
>
> To preserve and protect the preferential rights and priorities of public bodies and cooperatives as provided in subsection (a) of this section and to effectuate the intent and purpose of this chapter that at all times up to January 1, 1942, there shall be available for sale to public bodies and cooperatives not less than 50 per centum of the electric energy produced at the Bonneville project, it shall be the duty of the administrator in making

Second, it stated in Section 10(c) of the Regional Act [16 U.S.C. § 839g(c) (Supp. 1981)]:

> Nothing in this chapter shall alter, diminish, abridge, or otherwise affect the provisions of other Federal laws by which public bodies and cooperatives are entitled to preference and priority in the sale of federally generated electric power.

Congress' explicit preservation of the pre-existing preference and priority necessarily reaffirmed that preference and priority as it theretofore existed. The House Commerce Committee so indicated its intention in its report, where it stated:

> Preference means the statutory priority to purchase Federally-generated electricity, which has generally been provided to public bodies and rural electric cooperatives in over 32 Federal power marketing laws. These preference provisions date back to 1902 and were enacted to insure that Federal hydro-electric generating facilities would be operated for the benefit of the general public.
>
> . . .
>
> Concerns have been expressed that S. 885 might be construed to change the meaning or application of preference in the Northwest, and by precedent, nationally. However, the intention of this Committee is

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Footnote 6 (con't)

> contracts for the sale of such energy to so arrange such contracts as to make such 50 per centum of such energy available to said public bodies and cooperatives until January 1, 1942: *Provided*, that the electric energy so preserved for but not actually purchased by and delivered to such public bodies and cooperatives prior to January 1, 1942, may be disposed of temporarily so long as such temporary disposition will not interfere with the purchase by and delivery to such public bodies and cooperatives at any time prior to January 1, 1942: *Provided further*, that nothing herein contained shall be construed to limit or impair the preferential and priority rights of such public bodies or cooperatives after January 1, 1942; and in the event that after such date there shall be conflicting or competing applications for an allocation of electric energy between any public body or cooperative on the one hand and a private agency of any character on the other, the application of such public body or cooperative shall be granted.

clear. The Committee does not want to undo nearly 80 years of history or establish any precedent.

House Commerce Report, H.R. Rep. No. 976 (I), 96 Cong., 2d Sess. 33-34, *1980 U.S. Code Cong. & Ad. News* 5,999-6,000, in Pet. App. at D-76.

Footnote 6 (con't)

§832d. *Contracts for sale of electricity*

(a) *Authorization of administrator; contents of contracts*

Subject to the provisions of this chapter and to such rate schedules as the Federal Power Commission may approve, as provided in this chapter, the administrator shall negotiate and enter into contracts for the sale at wholesale of electric energy, either for resale or direct consumption, to public bodies and cooperatives and to private agencies and persons and for the disposition of electric energy to Federal agencies. Contracts for the sale of electric energy to any private person or agency other than a privately owned public utility engaged in selling electric energy to the general public, shall contain a provision forbidding such private purchaser to resell any of such electric energy so purchased to any private utility or agency engaged in the sale of electric energy to the general public, and requiring the immediate cancelling of such contract of sale in the event of violation of such provision. Contracts entered into under this subsection shall be binding in accordance with the terms thereof and shall be effective for such period or periods, including renewals or extensions, as may be provided therein, not exceeding in the aggregate twenty years from the respective dates of the making of such contracts. Contracts entered into under this subsection shall contain (1) such provisions as the administrator and purchaser agree upon for the equitable adjustment of rates at appropriate intervals, not less frequently than once in every five years, and (2) in the case of a contract with any purchaser engaged in the business of selling electric energy to the general public, the contract shall provide that the administrator may cancel such contract upon five years' notice in writing if in the judgment of the administrator any part of the electric energy purchased under said contract to the end that the preferential rights and priorities accorded public bodies and cooperatives under this chapter shall at all times be preserved. Contracts entered into with any utility engaged in the sale of electric energy to the general public shall contain such terms and conditions, including among other things stipulations concerning resale and resale rates by any such utility, as the administrator may deem necessary, desirable or appropriate

When Congress specifically re-enacts an existing law that has long been consistently applied and interpreted, it is deemed to have adopted that application and interpretation as its own. *E.g., United States v. Board of Commissioners*, 435 U.S. 110, 134 (1978):

> When a Congress that re-enacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation, and [the Supreme Court] is bound thereby.

In such circumstances, Congress' failure to revise or repeal the administrative application and interpretation is persuasive evidence that the interpretation is the one favored by Congress. *E.g., NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275-75 (1974):

> [A] court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration. This is especially so where Congress has re-enacted the statute without pertinent change. In these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress. We have also recognized that subsequent legislation declaring the intent of an earlier statute is entitled to significant weight.

Accord, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969) (footnotes deleted), in which the Supreme Court held:

> [T]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction.

Footnote 6 (con't)

> to effectuate the purposes of this chapter and to insure that resale by such utility to the ultimate consumer shall be at rates which are reasonable and nondiscriminatory. Such contracts shall also require such utility to keep on file in the office of the administrator a schedule of all its rates and charges to the public for electric energy and such alterations and changes therein as may be put into effect by such utility.

These principles apply in the present case, where Congress, armed with the knowledge of the long-standing application and interpretation of the preference clause, so very clearly preserved the pre-existing preferences and priorities. The Ninth Circuit correctly ruled to this effect. 686 F.2d at 711.

Unambiguous legislative history supports Congress' intention to preserve the pre-existing preference and priority as it then existed. Thus, the House Commerce Report stated:

> In marketing power generated at these Federal hydro projects, Congress provided that BPA is unequivocally obliged by statute to "give preference and priority to public bodies and cooperatives" which terms are defined in section 3 of the Bonneville Power Act. Such public bodies and cooperatives are known as "preference customers." S. 885, as amended by this Committee, does not alter in any way that congressionally-established obligation and priority, not [sic] does the Committee intend that the legislation be construed to alter or modify that obligation and priority.

House Commerce Report, *supra*, *1980 U.S. Code Cong. & Ad. News* at 5,990, in Pet. App. at D-61.

Later, the same House Report in its section-by-section analysis stated regarding Section 5(a):

> Section 5(a) makes clear that all power sales, including exchange sales, under this bill are subject at all times to the preference provisions of the Bonneville Project Act, as discussed earlier in this report. These provisions retain and assure preference and priority in BPA power sales to public bodies and cooperatives.

Id. at 59, in Pet. App. at D-119.

Later in Part II of the same report, the House Interior Committee stated:

> Section 5(a) makes clear that all power sales under this bill are subject at all times to the Bonneville Project Act, particularly Sections 4 and 5 of that Act. This provision therefore retains the preference and priority accorded public bodies and cooperatives in BPA power sales.

House Interior Report, *supra*, at 46, *1980 U.S. Code Cong. & Ad. News* at 6,044, in Pet. App. at E-103.

With regard to what is now Section 10(c) (16 U.S.C. § 839g(c) (Supp. 1981)), the House Interior Report stated:

> Section 10c expressly preserves the provisions of federal laws by which public bodies and cooperatives are entitled to preference and priority in the sale of Federally generated electric power.

Id. at 57, 1980 U.S. Code Cong. & Ad. News at 6,055, in Pet. App. at E-121.

Despite the long-standing preference, BPA's long-standing policy based upon this preference and the explicit mandate of Congress, BPA, assisted by the petitioners, attempted dramatically to alter its application of the preference provisions by giving the DSIs preference over public bodies and cooperatives for nonfirm energy. Industrial customers of public bodies such as amici in this case have relied on the preferences of those public bodies in planning both their firm and nonfirm power needs. If BPA's new application of the preference provision is upheld, there will be a complete reversal of the preference. In time of power shortage, the DSIs, who previously shared nonfirm energy equally with private utilities *after* the public bodies' secondary energy demands were met, would receive their *full* requirement for nonfirm energy *before* the public bodies receive *any* nonfirm energy whatsoever.

The interpretation of the Regional Act preference provisions urged by BPA and petitioners cannot be reconciled with other Federal power statutes. While petitioners and the BPA argue that section 5(a) of the Regional Act was not intended to preserve the priority of public bodies and cooperatives to nonfirm energy produced by BPA from projects covered by the Bonneville Project Act, they admit that section 10(c) was intended to preserve preference under statutes other than the Bonneville Project Act.[7] Several of

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7. *See* Brief for Petitioners at 26 n. 81 and Brief for Federal Respondents at 25-26 and 36-37.

the hydroelectric dams in the BPA system were authorized by or are governed by these other statutes.[8]

If section 5(a) is interpreted to deny public bodies and cooperatives priority access to nonfirm power from Bonneville Project Act projects, this interpretation would lead to a strange anomaly. Either Section 10(c) of the Regional Act must then be ignored as it applies to power sources in the regional network governed by these other statutes, or BPA will have to apply different preference rules for power sources authorized by the Project Act and for such sources governed by these other statutes. The former interpretation would lead to an inconsistent application of the same preference provision of the same statute, while the latter would prove unworkable because of the interconnection of energy coming, for example, from the Grand Coulee Dam and from the Bonneville Dam.

As the Ninth Circuit recognized and as respondents have pointed out in their brief, the BPA shift of position is not justified in the law. Nonetheless, BPA and petitioners have labored mightily to erect a tortured argument distorting both provisions of the Regional Act and its legislative history. Their position also cannot be justified by public policy. As

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8. BPA has been designated as marketing agent for numerous sources of power in the region developed pursuant to and governed by statutes other than the Bonneville Power Act. A partial list can be found in 22 Fed. Reg. 9,196 (1957), attached as Appendix B hereto. An example of this delegation is Exec. Order No. 8,526 of August 26, 1940, as amended by Exec. Order No. 12,038, 43 Fed. Reg. 4,957 (1978), applicable to Grand Coulee Dam. The Grand Coulee Dam Project, now known as the Columbia Basin Project, is governed by the Federal reclamation laws, including "the Act of June 17, 1902, and all acts amendatory thereto or supplementary thereto." 16 U.S.C. § 835-1 (1976). Those laws contain a specific preference clause to protect the priority access of "municipalities and other public corporations or agencies." 43 U.S.C. § 485h (c) (1976). Chief Joseph Dam, the Dalles Dam, John Day Dam and seven other dams are governed by the Flood Control Act of 1944, ch. 665, 58 Stat. 887 (1944) (codified in scattered sections of 16, 33 and 43 U.S.C.) which contains an explicit clause for "the sale of such power and energy . . . to public bodies and cooperatives." 16 U.S.C. § 825s (1976).

petitioners admit in their own brief, the DSIs are in a unique position among BPA customers to withstand intermittent interruptions of power service for a substantial portion of their load. Brief of Petitioners at 3. The reason for this lies in the nature of their operations. To quote their own brief:

> Among BPA's customers only DSI electro-process loads can withstand intermittent interruptions in power service without causing serious disruption or damage to production facilities.

Id. at 8. Yet they would require that BPA service the DSIs' full power requirements before furnishing any nonfirm energy to BPA's preference customers. That reversal of priority would effectively preclude BPA's preference customers from receiving any nonfirm energy in times of shortage, since the DSIs would have priority to nearly 1000 megawatts of nonfirm energy before BPA's preference customers could obtain any nonfirm energy to meet their much more modest needs.

If the court of appeals' decision is not upheld, the one industry which admittedly has gained the most from this region's past abundance of cheap energy and which admittedly can best withstand interruptions in its supply without undue hardship would gain permanent priority access over this interruptible energy at the expense of BPA's preference customers and of those industries which have relied on their access to this energy on the priority basis preserved to them under the Regional Act. Such a result reflects both bad law and bad policy.

CONCLUSION

There is no basis in policy or in the Regional Act for the position advocated by BPA and the DSIs. The Ninth Circuit correctly held that the statutory provisions preserving the existing power preferences clearly and unequivocally apply to give BPA's priority customers prior access to nonfirm power to meet the nonfirm power needs of their customers. There is no need to distort the law. The Ninth Circuit decision should be affirmed.

Respectfully submitted,

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APPENDIX A

UNITED STATES OF AMERICA
BEFORE THE 1983 WHOLESALE POWER
AND TRANSMISSION RATE ADJUSTMENT

Prepared Direct Testimony of

RICHARD P. WOLLENBERG
President and Chief Executive Officer
Longview Fibre Company
1632 Kessler Boulevard
Longview, Washington 98632

ON BEHALF OF

THE ASSOCIATION OF
PUBLIC AGENCY CUSTOMERS

May 23, 1983

Q. Please state your name and business address.

A. My name is Richard P. Wollenberg, and my address is 1632 Kessler Boulevard, Longview, Washington.

Q. What is your educational background?

A. I received a B.S. in Mechanical Engineering from the University of California in 1936. In 1938, I received a Master of Business Administration degree from Harvard University.

Q. What is your present occupation?

A. I am the President and Chief Executive Officer of Longview Fibre Company. I have held this position for five years.

Q. Prior to assuming your current position as President and Chief Executive Officer of Longview Fibre, what other positions have you held in the company?

A. I have been with Longview Fibre for 44 years. Before obtaining my present position, I served at various times

as Safety Engineer, Chief Engineer, Vice President and Manager of Container Operations, Executive Vice President, and President. In these various capacities, I have participated in the design and purchase of internal power equipment and in all energy purchase contracts.

Q. What is the purpose of your testimony?

A. Briefly stated, my testimony will describe how Longview Fibre uses electricity, why electricity is essential to Longview Fibre's operations, and how recent electric rate increases have affected Longview Fibre's operations, ability to compete in the national market, and potential new jobs in the Northwest.[2]

Description of Operations

Q. Please describe Longview Fibre's operations.

A. Longview Fibre produces pulp and paper at the Longview, Washington plant. The company has fifteen converting plants in locations around the United States. There are four box plants and one bag plant in the Bonneville service area, and eight box and two bag plants in California, the Midwest, and New England. All of these fifteen converting plants depend on the Longview mill for raw material.

At the Longview plant, we operate on a 24-hours-per-day, 7-days-a-week basis. This plant produces approximately 2,100 tons of finished product each day.

Q. How many people does Longview Fibre employ?

A. The company employs 1,900 people at the Longview mill and 3,300 nationwide. At converting plants located within the Bonneville service area, we directly employ over 300 in Seattle, Yakima, Portland, and Twin Falls. In addition, we create thousands of jobs indirectly for raw material suppliers and service industries.

Raw materials for Longview are trucked from nearby sawmills and barged from regional centers in Lewiston, Idaho, and The Dalles and Boardman, Oregon. Between

350 and 400 people, employed by others, depend upon Longview for jobs transporting raw materials alone. This does not include jobs created by the processing and delivery of chemicals required for our manufacturing, or the shipment of finished products by truck or rail to markets.

Use of Electricty

Q. How is electricity used at the Longview mill?[3]

A. Approximately 83% of our electricity is used for pumps, pulp refining, paper machine drives, fans, and conveying equipment. Approximately 4% is used for lighting, air conditioning and similar loads, and approximately 7% for environmental equipment loads.

A year ago, those numbers were different because we were purchasing 25 megawatts of electricity for the generation of low-pressure steam. That load became uneconomical as a result of the 1982 rate increase and we discontinued use of our electrode boiler. Between March 1, 1983 and June 30, 1983, we will run the boiler on interruptible spill power, purchased under BPA's NF-2 Schedule, but only because of the availability of competitively priced non-firm electricity in the short term. Under present conditions, this use is pure substitution for other fuels, either hog fuel or residual oil, and future use will be determined by the price and availability of electricity. We do not foresee a firm load price that will be competitive with the other fuels which we can use for steam generation. Unless the NF-2 Schedule, plus the serving utility's surcharges, remain near present levels, after June 30th, that load will be dropped. The proposed NF Schedule, if not surcharged heavily by Cowlitz PUD, will barely be economically attractive is spill power is available.

Q. For the years 1979-1982, please describe the amount of electricity purchased at the Longview plant.

A. In 1979, we purchased 870,000 megawatt hours of electricity. That amount decreased to 850,000 megawatt hours in 1981, partly due to curtailments and elimination

of steam generation in the electrode boiler. Because we normally operate on a 7-days-per-week, 24-hours-per-day basis, we are a [4]100% load factor customer of Cowlitz Public Utility District No. 1.

Impact of Electric Rate Increases - Effect on Load

Q. During the years 1979-1982, what conservation efforts has Longview made?

A. During this period, Longview Fibre has introduced many significant, cost-effective conservation measures into its operations. Substantial electricity savings have been realized by equipment and process changes as well as purchasing energy-efficient motors, using adjustable frequency drives, improving pumping efficiencies and changing lighting specificiations [sic]. During 1982, we energized approximately 25 adjustable frequency drives, three on major retrofits, the balance on new installations. In addition, it is important to note that for certain operational functions, there is no practical, cost-effective substitute for electricity. We operate several thousand motors to drive pumps, machines, refiners, fans, and the like. These are essential functions and it would be utterly impractical to use any other prime movers.

Q. During the years 1979-1982, how have electric rate increases affected your electricity bills?

A. In 1979, for the Longview plant, our total electric bill was $3,335,000. Our electric bill escalated to $5,757,000 in 1980. In 1981, a year of some mill curtailments, our total bill was approximately $7,910,000, and for calendar 1982, with many mill curtailments, our bill was approximately $10,250,000.

Q. Your purchased electricity in 1982 (660,000 megawatt hours) was only three-fourths that purchased in 1979 (870,000 megawatt hours), yet your cost in 1982 was roughly three times the 1979 costs. Does this comparison of ratios portend any changes in energy planning?

A. Paying three times as many dollars for only three-quarters the amount of energy means we paid four times as much for electricity in 1982 as we paid in 1979. This increase has already resulted in dropping our firm load by about 26%. This reduction was achieved through a combination of efforts including cost-effective conservation, and taking our electrode boiler off firm contract. Our energy plan must consider maximizing all potential resources and evaluating alternative energy sources.

Q. Could the proposed Bonneville rates for 1983 through 1985 further change your plans for purchasing electricity?

A. Any change in Bonneville's rate to Cowlitz PUD is passed through, with surcharges, directly to us as a consumer. Although Cowlitz PUD has other hydroelectric generating resources, these have been reserved for residential and commercial consumers. Our rate is the Bonneville PF rate plus utility overhead, transmission costs, WPPSS 4 and 5 surcharges, and applicable taxes. If the PF Schedule now proposed is adopted, our average increase would be between 25 and 30% after passage through Cowlitz. Our 1984-85 costs will be five times our 1979 costs. Longview Fibre has cogeneration turbine capacity in excess of 70 megawatts. We currently have an agreement with BPA to deliver up to 45 megawatts to BPA if needed by it. This agreement terminates June 30, 1983. At projected power costs, it would be economically prudent for us to use this turbine capacity for our own loads and further reduce our purchased electricity by 40 to 45 megawatts. If this decision were made, our load on Bonneville would be reduced from 108 megawatts, where it was one year ago, below the 80 megawatts we currently purchase, to 40 megawatts—a load drop of 68 megawatts in a period of one year.[6]

Q. Do other pulp and paper mills in the Northwest have similar co-generation facilities?

A. Several large plants do have co-generation systems, or the potential for co-generating electricity.

Q. Could Longview Fibre expand its co-generation capacity or production?

A. We presently have excess turbine generator capacity, in the form of backup systems. It is possible to expand self-generation capability in more than one way and it might become economically feasible to do so if the cost of purchased electricity continues its meteoric rise.

Impact of Electric Rate Increases · Effect on Competition

Q. How would these contingency plans affect your competitive position in the Northwest market?

A. Our concern is not only with our position in the Northwest market, but rather with the market nationally and internationally. Most of the product, like that of others in the Northwest, moves to external markets. Electricity accounts for 5% of our total manufacturing cost. Any increase in that cost dramatically impacts our ability to compete in the broadest sense. This increase has directly affected our competitiveness. Longview Fibre competes vigorously for business across the United States. We ship to Ohio, New York, and Florida, as examples. Notwithstanding the high cost of transportation to these distant markets, we have been able to compete successfully with firms located closer to our market because the low cost of electricity and raw materials compensated for the higher cost of transportation. These cost advantages have been lost in large part due to increases in electric rates. If our power costs continue to increase at the current rate, our ability to compete will be further [7] eroded. We have had to give up part of our business in Florida because we could not afford to meet the price levels.

Impact of Electric Rate Increases · Effect on Jobs

Q. Has the increase in manufacturing costs affected potential jobs at the Longview mill?

A. Most definitely. We projected the construction of a twelfth paper machine at our Longview plant at a cost of $50 million. This machine would increase our production by 20% and directly result in 100 new jobs. Additional jobs would be indirectly created through the Northwest for service industries and raw material suppliers. We have deferred this project because of the escalating manufacturing costs which impair our competitiveness throughout the country.

It is quite clear that recent and prospective substantial electric rate increases have had and will continue to have a dramatic effect on Longview Fibre's operations. Furthermore, the impact of these increases has directed affected our company's ability to create new job opportunities in Longview and throughout the Northwest.

Q. Does this conclude your testimony?

A. Yes, it does.

ERRATA TO TESTIMONY OF RICHARD WOLLENBERG (Exhibit PA-3)

Page 3, line 1, reads as follows:
"83%"

Page 3, line 1, is changed to read as follows:
"87%"

Page 3, lines 24-25, read as follows:
". . . partly due to curtailments and elimination of steam generation in the electrode boiler"

Page 3, lines 24-25, are changed to read as follows:
". . . partly due to mill curtailments and conservation measures. In 1982, the amount again decreased, to 660,000 megawatt hours, due to curtailments and elimination of steam generation in the electrode boiler."

Page 6, line 16, reads as follows:
"5%"

Page 6, line 16, is changed to read as follows:
"6%"

APPENDIX B

DEPARTMENT OF THE INTERIOR
Office of the Secretary
[Order 2753, Amdt. 3]
BONNEVILLE POWER ADMINISTRATION
MARKETING OF ELECTRIC POWER AND ENERGY
NOVEMBER 12, 1957.

This amendment supersedes Amendment No. 2 of Order No. 2753 (22 F.R. 4169) and is issued for the purpose of including in the list appearing in section 1 an additional source of electric power and energy—John Day Dam. The order as amended reads as follows:

SECTION 1. *Designation as marketing agency.* The Bonneville Power Administration is designated as the agency to market available surplus electric power and energy generated at the sources specified in this section pursuant to the specific statutory authority as to each project.

(a) Bonneville Project, pursuant to the Act of August 20, 1937 (50 Stat. 731), as amended;

(b) McNary Dam and Ice Harbor Dam, pursuant to the Act of March 2, 1945 (59 Stat. 10);

(c) Hungry Horse Dam, pursuant to the Act of June 5, 1955 (58 Stat. 270);

(d) The following sources pursuant to the Act of December 22, 1944 (58 Stat. 887):

Albeni Falls Dam.
Big Cliff Dam.
Chief Joseph Dam.
Detroit Dam.
Dexter Dam.
Lookout Point Dam.
The Dalles Dam.
Hills Creek Dam.
Cougar Dam.
John Day Dam.

(e) The following sources, pursuant to the Federal Reclamation laws (Act of June 17, 1902, 32 Stat. 388, and acts amendatory thereof or supplementary thereto):

Grand Coulee Dam.
Chandler Power Plant, Kennewick Division, Yakima Project.
Roza Power Plant, Roza Division, Yakima Project.

SEC. 2. *Contracts.* The Bonneville Power Administrator may, subject to the applicable statutes, enter into contracts for the sale or interchange of electric power and energy in the performance of the functions assigned by section 1 of this order. The Bonneville Power Administrator may, in writing, redelegate to officers and employees of the Administration the authority granted in this section, and he may authorize written redelegations of such authority.

SEC. 3. *Revocation.* Orders Nos. 1994 (9 F.R. 11966) and 2115 as amended (10 F.R. 14211; 11 F.R. 8830; 17 F.R. 5197; 18 F.R. 2831) are revoked.

(Sec. 2, Reorg. Plan No. 3 of 1950; 5 U.S.C. 1952 ed., sec. 133z-15, note)

FRED A. SEATON
Secretary of the Interior.

[F.R. Doc. 57-9474; Filed, Nov. 15, 1951, 8:47 a.m.]